SERVED: March 30, 1994

NTSB Order No. EA-4121

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 16th day of March, 1994

BONNIE LEE MENDENHALL, Applicant, v. DAVID R. HINSON, Administrator, Federal Aviation Administration, Respondent.	Docket No. 150-EAJA-SE-12564

OPINION AND ORDER

Applicant has appealed the decision of Administrative Law Judge Jerrell R. Davis, issued September 18, 1992 (a copy of which is attached). In that decision, the law judge denied applicant's request, filed pursuant to 5 U.S.C. 504, the Equal Access to Justice Act, as amended (EAJA), for attorney fees and expenses in connection with the Administrator's emergency revocation of Ms. Mendenhall's commercial pilot instrument rating and her flight instructor certificate. The law judge dismissed

the application because the Administrator had been substantially justified in pursuing the matter. See 49 U.S.C. 504(a)(1). We affirm the law judge's decision.[1]

The following facts are undisputed:

1. It is unrebutted (see Administrator's Answer to EAJA Application, at 4) that applicant failed eight practical tests (of 16 taken) between September 1, 1988 and March 6, 1992. Among these was a reexamination of her airline transport pilot (ATP) and CE-500 rating, which she failed on July 23, 1991. That reexamination had been requested after she had failed three Part 135 oral tests within 1 month. Id. Applicant retook the ATP flight check on November 14, 1991, which she again failed. Id. and EAJA Application, Exhibit 3. As a result, applicant was advised that the FAA intended to reexamine her instrument rating.

2. On March 6, 1992, FAA inspector Ray Evans reexamined applicant pursuant to Section 609 of the Federal Aviation Act, 49 U.S.C. App. 1429, by way of a flight test in an aircraft simulator, to review applicant's competency to hold the instrument rating. The inspector found applicant's performance "unsatisfactory," and noted three maneuvers that were below standard.[2] He recommended additional training and the scheduling of another reexamination check. Applicant does not contest the Administrator's allegation that, because applicant failed to perform to the required level of competence, she failed the Section 609 reexamination.

---

[1]Applicant has moved to strike a number of documents the Administrator attached to his reply brief. We grant the motion in great part, although the Administrator's response is not unconvincing in aspects. We recognize both that the Administrator had the opportunity to present evidence in his answer to the EAJA Application, and that the lack of a hearing on the merits complicates development of the record. As we have no need of the offered documents, we grant the motion without deciding these issues.

Applicant also asks that we strike two sentences in the Administrator's Reply Brief, at 20. We deny this request, as we find nothing objectionable in this language. It states merely the obvious, and suggests no improper client contact. We do, however, grant the Administrator's request (Reply at 18) that we strike references to settlement discussions (see Appeal at 2, 6, 14), as they are contrary to public policy.

[2]Overshooting the assigned altitude, and two failures in her navigation. EAJA Application, Exhibit 1.

3. On March 16, 1992, the involved FSDO[3] wrote to applicant, noting that her performance at the reexamination failed to meet the standards of the Instrument Rating Airplane Practical Test Standards. The three main deficiencies in her performance were repeated to her, and she was asked to surrender her instrument rating. The letter further noted that, at a minimum, her flight instructor certificate was not valid without an instrument rating. Id. at Exhibit 2.

4. On April 13, 1992, FSDO staff met with applicant, at her request. She asked that she be given another check in a CE-500 aircraft, rather than a simulator, that the check be for an ATP and type rating rather than an instrument rating, and that it be done in another area, by an FAA inspector unfamiliar with her history. She provided documents to show that she had received additional training. The FAA, according to a memo in the record (id., Exhibit 3) was concerned that safety was implicated by her failure to fly designated altitudes and becoming disoriented,[4] but agreed to review her training records.

5. By letter of April 21, 1992, the FAA declined her requests, finding that "in the interest of safety another reexamination would not be appropriate." Id. at Exhibit 4. Applicant was asked to surrender her instrument rating and flight instructor certificate.

6. On May 16, 1992, applicant performed a practical examination for an ATP certificate in the CE-500, the examination being conducted by an FAA-designated examiner. This examiner issued her a temporary ATP certificate for the CE-500.

7. On May 21, 1992, the Administrator issued the instant emergency order of revocation against applicant's instrument rating and flight instructor certificate. At that time, the Administrator had not been advised by applicant of the May 16, 1992 events.

8. Applicant's June 2 answer to the emergency order did not specifically advise of the May 16 examination or its results. The answer ambiguously stated that applicant had complied with the FAA's instructions to receive additional training and schedule another reexamination. Her June 8 memorandum in support of her answer noted the May 16 reexamination, however, as did discovery documents dated June 6.[5]

---

[3]Flight Standards District Office of the FAA.

[4]Apparently a continuing problem during the additional training. Administrator's Answer to EAJA Application, at 5.

[5]Applicant argues that papers dated June 3 so advised. We

9. By letter dated June 8, the Administrator withdrew his order. The law judge, accordingly, discontinued the proceeding. This EAJA application followed.

Applicant's position in this litigation is frivolous. Applicant argues that fees are appropriate because the Administrator should have known, when he issued his order, that 5 days earlier applicant had passed a reexamination given by a designated examiner, not an FAA employee, and outside the local FSDO area. Applicant also argues that the FAA should have immediately understood the significance of the temporary ATP certificate that applicant surrendered after the revocation order was issued, and withdrawn its order at that time.[6]

We refuse to find that either of these matters constitutes a failure of investigation of the degree that would warrant a fee award. We do not think it reasonable to expect that the FAA's central computer records would have included this latest information by May 21. Further, on receipt of the temporary ATP certificate, rather than the expected commercial pilot certificate, an inquiry was initiated. We find that the matter was investigated and resolved timely, one aspect of our analysis being the fact of other time pressures due to expedited filing

(..continued)
can find no such documents in the record other than interrogatories, which contain no reference to the May 16 reexamination. Regardless, the time difference is not material.

[6]Applicant also argues (Appeal at footnote 1) that revocation would not have been substantially justified even if she had not requalified. Although she states her intent to preserve this argument on appeal, we disagree. That case was not before the law judge and is not before us.

requirements (see 49 C.F.R. 821.31).

Most importantly, all applicant had to do was to provide the requalification information clearly and immediately either to the FAA attorney[7] or to the involved FSDO personnel, not a burdensome, expensive, or unreasonable task. We decline to issue a decision that would support the view that respondents in enforcement actions may "sandbag" the Administrator so as to obtain fee reimbursement. See Wessel v. Administrator, NTSB Order EA-3875 (1993) at 6-8.

We would note, finally, that applicant's fee calculation would not be authorized or reasonable in any event. Had applicant immediately advised the FAA of her successful reexamination, the costs to obtain dismissal could have been de minimis. Moreover, the application seeks fees for services that were provided long before the Administrator's order was issued. Although we do not decide this issue here, and the Administrator's opposition offers no judicial views on the issue for our study, we question whether counsel's pre-order activities would qualify as fees and other expenses incurred in connection with an adversary proceeding, as required by 5 U.S.C. 504(a)(1).[8]

[7]Even a call to the appropriate office likely would have sufficed.

[8]In light of our disposition, we need not rule on applicant's supplemental fee requests.

ACCORDINGLY, IT IS ORDERED THAT:

1. Applicant's motion to strike is granted in part;

2. The Administrator's motion to strike is granted;

3. Applicant's appeal is denied; and

4. The initial decision, denying an EAJA award, is affirmed.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HAMMERSCHMIDT, and HALL, Members of the Board, concurred in the above opinion and order.